U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER'S DOCUMENT NO. 058 48 3346 D1	:	NO. 2544
Issued to: GERARD GENER	:	

This appeal has been taken in accordance with 46 U.S.C. §7702 and 46 C.F.R. §5.701.

By an order dated 2 December 1991, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's Merchant Mariner's Document upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 14 March 1991, Appellant wrongfully used cocaine as evidenced in a urine specimen collected on that date which subsequently tested positive for the presence of cocaine.

The hearing commenced at New York, New York on 17 July 1991. At that time, Appellant appeared, without professional counsel and requested and received a continuance until 1 August 1991. The hearing was resumed and completed on 1 August 1991, with Appellant appearing, represented by professional counsel.

Appellant entered a response denying the charge and specification as provided in 46 C.F.R. §5.527. The Investigating Officer introduced four exhibits into evidence and two witnesses testified at his request (one of these by telephonic testimony). Appellant introduced one exhibit into evidence. One witness testified on behalf of Appellant. In addition, Appellant testified on his own behalf.

The Administrative Law Judge's final order revoking Appellant's Merchant Mariner's Document was entered on 2 December 1991, and was served on Appellant on 4 December 1991. Appellant filed a timely notice of appeal on 31 December 1991, and received a copy of the full transcript on 23 January 1992. Appellant filed his supporting brief on 24 March 1992. Accordingly, this matter is properly before the Commandant for review.

Appearance: Simon W. Tache, 1700-06 Race Street, Philadelphia, PA 19103.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of the above captioned Document, issued to him by the United States Coast Guard.

On 14 March 1991, Appellant provided a preemployment urine specimen for drug testing purposes at the Methodist Hospital,

Brooklyn, New York. The specimen collector was Irene Reyes. Ms. Reyes gave Appellant a sealed container which was opened in Appellant's presence and into which Appellant voided a urine specimen. Ms. Reyes sealed the bottle with a tamper-proof seal, and in Appellant's presence, identified it with Number 00114670. Appellant then signed and certified step VII of the part of the Drug Testing Custody and Control Form ("DTCC"), certifying that he provided his specimen to the collector in a specimen bottle, sealed with a tamper-proof seal in his presence; and that the information provided on the DTCC Form and on the label affixed to his specimen container was correct.

Appellant's specimen was properly sealed and packaged for shipment and sent to Nichols Institute, a NIDA Certified testing laboratory, on 16 March 1991. The Laboratory received the specimen intact and conducted the prescribed tests. The specimen tested positive for cocaine.

Nichols Institute forwarded its laboratory report to the Medical Review Authority, Greystone Health Sciences Corporation. The Medical Review Authority found the chain of custody intact and assigned Appellant's file to its Medical Review Officer, ("MRO"), Dr. Katsuyama. The MRO interviewed Appellant telephonically and subsequently determined that Appellant's specimen had tested positive for cocaine.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's document. Appellant sets forth two bases of appeal:

a. The MRO did not properly consider Appellant's explanation for the positive test results;

b. The Administrative Law Judge erred in not making a recommendation that Appellant participate in a bona fide drug abuse rehabilitation program.

OPINION

I

Appellant asserts that the MRO failed to properly consider Appellant's defense that the positive test finding resulted from Appellant's consumption of a borrowed stomach medication. In essence, Appellant argues that the provisions of 49 C.F.R. §40.33(c)(6) were violated. The pertinent portions of this regulation state:

> If a test is verified positive . . .
> the employee may present to the MRO
> information documenting that serious
> illness, injury, or other circumstances
> unavoidably prevented the employee from
> timely contacting the MRO. The MRO, on
> the basis of such information, may reopen
> the verification, allowing the employee to
> present information concerning a legitimate
> explanation for the confirmed positive test.
> If the MRO concludes that there is a
> legitimate explanation, the MRO declares
> the test to be negative.

Appellant's alleged consumption of a borrowed stomach medication appears in the record through his own testimony and the testimony of his witness, Matthew Martire. [TR 95-109; 110-

126]. The MRO, Dr. Katsuyama, did not testify. The only other evidence relating to this issue appears in I.O. Exhibit 4, in which the President of the Medical Review Authority notified the Investigating Officer that Appellant had claimed to have taken a "non-prescribed compound put together by a friend for a stomach ailment which contained cocaine."

The record is silent regarding the weight the MRO may have given Appellant's assertion. However, having fully reviewed the record, I concur with the Administrative Law Judge that the testimony of Appellant and Martire is not fully consistent. [Decision and Order 10-11]. Moreover, Appellant failed to prove, even if he had consumed a borrowed medication, that it contained cocaine. The evidence, at best, was purely speculative. [TR 101, 108].

Accordingly, the record does not support the assertion that the MRO violated 49 C.F.R. §40.33(c)(6). To the contrary, the record fully supports the finding that Appellant used cocaine.

II

Appellant asserts that the Administrative Law Judge failed to recommend that Appellant participate in a drug rehabilitation program. From this, Appellant infers that he did not need such a program because he was not a drug user. I disagree.

The Administrative Law Judge is under no statutory or regulatory duty to require a respondent to undergo drug rehabilitation. Title 46 U.S.C. §7704(c) provides, that if the respondent provides satisfactory proof of cure, the

Administrative Law Judge may issue a sanction less than revocation. The establishment of proof of cure, normally obtained by evidence of successful completion of a drug rehabilitation program, is solely at the option of the respondent.

The fact that the Administrative Law Judge did not recommend that Appellant participate in a drug rehabilitation program is irrelevant. Moreover, Appellant's contention that a lack of a recommendation ipso facto infers that Appellant did not use cocaine is based neither in fact nor in law and is not supported by the record. Accordingly, this basis of appeal is without merit.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated 2 December 1991, is hereby AFFIRMED.

//S// J. W. KIME
J. W. KIME
Admiral, U. S. Coast Guard
COMMANDANT

Signed at Washington, D.C., this 11th day of June, 1992.